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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

NOOR HASSAN,

Defendant and Appellant.

D073745

(Super. Ct. No. SCD273600)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy R. Walsh, Judge. Affirmed.

Eric E. Reynolds, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Michael Pulos and Britton B. Lacy, Deputy Attorneys General, for Plaintiff and Respondent.

Noor Hassan pleaded guilty to unlawfully taking and driving a vehicle (Veh. Code, §10851, subd. (a)). He initially declined the terms of probation and therefore the

court sentenced him to two years in county jail. He later moved to recall his sentence, and the court granted the motion, sentencing him to three years of formal probation. Hassan agreed to the court's imposition of probation conditions, including an electronics search condition requiring him to "submit [his] person, vehicle, residence, property, personal effects, computers, and recordable media to search at any time with or without a warrant, and with or without reasonable cause, when required by [a probation officer] or law enforcement officer."

Hassan's sole argument on appeal is that the electronics search condition is facially unconstitutionally overbroad because it allows an unfettered search of everything on his electronic devices and it is not carefully tailored to serve the state's interests. We affirm.

FACTUAL AND PROCEDURAL HISTORY

The probation report states that in September 2017, a woman took her vehicle to a repair shop. Hassan approached an attendant there and claimed the vehicle was his. The attendant let Hassan get into the vehicle, and Hassan drove away. Shortly afterwards, Hassan attempted to steal a car key from a hotel's valet desk, but he was foiled and the police were called. When police contacted him, they found on his person the key to the vehicle he had stolen from the repair shop.

Hassan has a lengthy criminal record as a juvenile and as an adult, and he was on probation when he committed the underlying crime. As the probation report summarizes it, "[Hassan] has a criminal history riddled with numerous violent and theft[-]related offenses. The instant offense is his fourth vehicle theft[-]related offense, which dates back to his juvenile years. As a juvenile, he was suspected of being a member of a

vehicle theft ring. [¶] He has been afforded numerous opportunities on probation, both as a juvenile and as an adult. His repeatedly poor performance on probation in the past resulted in multiple commitments to a secure environment; such as, CYA [California Youth Authority] and state prison. His performance from CYA is reported as unsuccessful as [he] continued to commit new offenses into adulthood."

DISCUSSION

I. Legal Principles and Standard of Review

"When an offender chooses probation, thereby avoiding incarceration, state law authorizes the sentencing court to impose conditions on such release that are 'fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer.' ([Pen. Code,] § 1203.1, subd. (j).) Accordingly, . . . a sentencing court has 'broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1.' [Citation.] But such discretion is not unlimited: '[A] condition of probation must serve a purpose specified in the statute,' and conditions regulating noncriminal conduct must be ' "reasonably related to the crime of which the defendant was convicted or to future criminality." ' " (*People v. Moran* (2016) 1 Cal.5th 398, 402-403.)

"[T]he types of conditions a court may impose on a probationer are not unlimited. We first recognized the limits on probation conditions in the seminal case of *People v. Lent* (1975) 15 Cal.3d 481 'Generally, "[a] condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted,

(2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality' [Citation.]" [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality.' " (*People v. Moran, supra*, 1 Cal.5th at p. 403.)

Appellate courts generally review probation conditions for abuse of discretion. (*People v. Moran, supra*, 1 Cal.5th at p. 403; *People v. Acosta* (2018) 20 Cal.App.5th 225, 229.) Thus, "a reviewing court will disturb the trial court's decision to impose a particular condition of probation only if, under all the circumstances, that choice is arbitrary and capricious and is wholly unreasonable." (*Moran*, at p. 403.) But constitutional challenges, such as a claim that a condition is overbroad, are reviewed de novo. (*Acosta*, at p. 229; *People v. Stapleton* (2017) 9 Cal.App.5th 989, 993.) A condition should be invalidated as overbroad when it imposes limitations on a person's constitutional rights that are not closely tailored to the purpose of the condition. (*Acosta*, at p. 229, citing *In re Sheena K.* (2007) 40 Cal.4th 875, 890.) " 'A restriction is unconstitutionally overbroad . . . if it (1) "impinge[s] on constitutional rights," and (2) is not "tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation." [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of

course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' " (*Stapleton*, at p. 993.)

Hassan contends the electronics search condition is overbroad on its face because it does not limit in any way the scope of any search of his electronic devices—assertedly having applications containing detailed personal information unrelated to any potential probation violation—and it does not specify the devices to which it applies. He relies on the United States Supreme Court's observation in *Riley v. California* (2014) 573 U.S. 373, 385-386 (*Riley*) as to the breadth of data on a cell phone, and argues *Riley* makes clear such searches implicate privacy concerns not implicated by a traditional search. Hassan maintains we should follow the reasoning of the courts in *People v. Valdivia* (2017) 16 Cal.App.5th 1130, review granted February 14, 2018, S245893 and *People v. Appleton* (2016) 245 Cal.App.4th 717, which held warrantless searches of electronic storage devices carried the potential for significant intrusion into a defendant's private affairs having nothing to do with illegal activity (*Valdivia*, at p. 1144; *Appleton*, at p. 725), and remanded for the trial court to narrow the condition. (*Valdivia*, at p. 1147; *Appleton*, at p. 727.)¹

¹ *People v. Valdivia*, *supra*, 16 Cal.App.5th 1130 (rev.gr.), involved a defendant who pleaded no contest to inflicting corporal injury on his spouse and was sentenced to probation. His conditions of probation not only permitted warrantless searches of electronic storage devices under the defendant's control, but required him to provide necessary passwords to facilitate any such search. Though it upheld the reasonableness of the electronic search condition under *People v. Lent*, *supra*, 15 Cal.3d 481, the *Valdivia* court, based on *Riley*, *supra*, 573 U.S. 373, held the electronic search condition was unconstitutionally overbroad under the Fourth Amendment (*Valdivia*, at pp. 1144-1147) because its potential impact on the defendant's Fourth Amendment rights

The People respond that the overbreadth doctrine is not recognized in the Fourth Amendment context; Hassan waived his Fourth Amendment rights by consenting to the condition; and the challenged condition is reasonable and constitutional given the "special needs" of California's probation system as well as the fact Hassan's diminished expectation of privacy as a probationer does not take precedence over the state's compelling probationary interests.

We reject Hassan's overbreadth challenge on its premise, that is, that *Riley's* analysis of Fourth Amendment protections applies to him. In *Riley*, the court held the warrantless search of *an arrestee's* cell phone implicated and violated the individual's Fourth Amendment rights. (*Riley, supra*, 573 U.S. 373 at p. 403.) The court explained that modern cell phones, which have the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person's life. (*Id.* at pp. 393-394.) The court emphasized, however, that its holding was that cell phone

"exceed[ed] what is reasonably necessary to serve the government's legitimate interest in ensuring that he complies with the terms of his probation." (*Valdivia*, at p. 1147.) In *Appleton*, the court found the state had an interest in preventing the defendant from "us[ing] social media to contact minors for unlawful purposes." (*People v. Appleton, supra*, 245 Cal.App.4th at p. 727.) Given that limited justification, the court struck a general electronic device search condition and remanded the matter to the trial court to craft a narrower condition. (*Ibid.*) This court disagreed with *Appleton* in both *People v. Trujillo* (2017) 15 Cal.App.5th 574, review granted November 29, 2017, S244650, and *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted December 14, 2016, S238210, explaining that *Riley's* conclusions do not necessarily apply in the probation-condition context without specific facts showing a heightened privacy interest. (*Trujillo*, at pp. 587-589; *Nachbar*, at p. 1129.) We find the reasoning of *Trujillo* and *Nachbar* persuasive.

data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Riley*, at p. 401.)

Unlike the defendant in *Riley* who had not been convicted of a crime and was still protected by the presumption of innocence, Hassan is under probation supervision, and thus his privacy rights are diminished and may more readily be burdened by restrictions that serve a legitimate purpose. (See *United States v. Knights* (2001) 534 U.S. 112, 119 [probationer does not " 'enjoy "the absolute liberty to which every citizen is entitled" ' "]; *People v. Trujillo*, *supra*, 15 Cal.App.5th 574, rev.gr.; *People v. Nachbar*, *supra*, 3 Cal.App.5th at p. 1129, rev.gr.; *In re J.E.* (2016) 1 Cal.App.5th 795, 805, review granted Oct. 12, 2016, S235528.) In *People v. Trujillo*, this court made the same observation, pointing out that courts routinely uphold broad probation conditions permitting searches of a probationer's residence without a warrant or reasonable cause. (*Id.* at pp. 587-588.) Like the defendant in *Trujillo*, at pages 588-589, Hassan does not challenge the probation condition authorizing officers to conduct random and unlimited searches of his residence at any time and for no stated reason, and he made no showing that a search of his electronic devices would be any more invasive than an unannounced, without cause, warrantless search of his residence. Here, as in *Trujillo*, the record supports a conclusion that the electronic device search condition is necessary to protect public safety and to ensure Hassan's rehabilitation during his supervision period, and a routine search of defendant's electronic data "is strongly relevant to the probation department's supervisory function." (*Id.* at p. 588.) We adopt a similar conclusion as *Trujillo*: "Absent particularized facts showing the electronics-search condition will infringe on [Hassan's]

heightened privacy interests, there is no reasoned basis to conclude the condition is constitutionally overbroad or to remand for the court to consider a more narrowly-drawn condition." (*Id.* at p. 589.) On this record, we conclude the burden on Hassan's privacy is insufficient to show overbreadth, given the legitimate penological purpose shown for searching his electronic devices.

Because we reject Hassan's overbreadth claim on its premise, we do not address the People's contention that the overbreadth doctrine does not apply outside the First Amendment context. (Compare *Schall v. Martin* (1984) 467 U.S. 253, 268, fn. 18 ["[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad"] with *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1095, fn. 15 [noting that limitation of overbreadth claims to First Amendment violations "is not invariably observed"].)

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.